88-779

Supreme Court, U.S.
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CLERK

No.

In the Supreme Court of the United States

Term, 19

COMMONWEALTH OF PENNSYLVANIA
vs.
WILLIAM GARNER,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF QUESTION INVOLVED

Do Pennsylvania's Statutory Rape Statutes violate due process requirements by establishing two different ages of consent for the same act—sexual intercourse per os?

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NO.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Garner, Petitioner, by Mark S. Love, Esquire, of Miller and Love hereby petitions your Honorable Court for a Writ of Certiorari to review the final order of the Supreme Court of Pennsylvania in this case.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

On September 23, 1988, an order was entered by the Pennsylvania Supreme Court in the case of *Commonwealth of Pennsylvania vs. William Garner*. A copy of this unreported order is attached as Exhibit "A" (App. p. 1a). The order denied a petition for allowance of appeal of an opinion and order entered by the Superior Court of Pennsylvania on January 20, 1988 (Exhibit "B", App. p. 2a) which reversed a holding by the Court of Common Pleas of Monroe County, Pennsylvania entered on December 29, 1986. The Superior Court's decision is reported at 371 Pa. Superior Ct. 408, 538 A.2d 506 (1988).

The lower Court had held that the Pennsylvania Crimes Code, as amended, did not meet due process requirements in that there was a statutory ambiguity as to whether consensual sexual intercourse per os with a 15-year-old person constituted a crime. The lower Court's opinion is attached as Exhibit "C" (App. p. 9a).

JURISDICTIONAL STATEMENT

Jurisdiction is conferred by 28 U.S.C. §1257(3). On September 23, 1988, Petitioner's case was decided by a final order without opinion of the Pennsylvania Supreme Court. This Petition for Writ of Certiorari is timely filed because it was mailed within 60 days of September 23, 1988. Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 Pa. C.S.A. §3101. Definitions

Subject to additional definitions contained in subsequent provisions of this chapter which are applicable to specific provisions of this chapter, the following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

'Deviate sexual intercourse.' Sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

'Indecent contact.' Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.

'Sexual intercourse.' In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973.

18 Pa. C.S.A. §3122. Statutory Rape

A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973. As amended 1976, May 18, P.L. 120, No. 53 §1, effective 30 days.

18 Pa. C.S.A. §2123. Involuntary Deviate Sexual Intercourse

A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;

(3) who is unconscious;

(4) who is so mentally deranged or deficient that such person is incapable of consent; or

(5) who is less than 16 years of age.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973.

STATEMENT OF THE CASE

Petitioner was charged with engaging in sexual intercourse per os with a 15-year-old victim in violation of section 3123(5) of the Pennsylvania Crimes Code (Exhibit "D", App. p. 14a). The sole basis for this charge was the age of the other participant in this voluntary act; no charges of forcible compulsion were brought against Petitioner under 18 Pa. C.S.A. §2123(1)-(4). Petitioner timely filed an omnibus pre-trial motion; wherein, he alleged that the Pennsylvania Sex Crimes Statutes were ambiguous and contained an irreconcilable conflict in that two distinct ages of consent were established for the act in question.[1] The lower Court agreed, and held that due process considerations required a determination that 18 Pa. C.S.A. §3123(5) had been impliedly repealed by a newer act establishing the age of consent for this type of conduct as 14 years. Since the victim in the instant case was 15 years of age, the lower Court held that the Defendant had not been charged with any criminal conduct cognizable under Pennsylvania Law.

Respondent, Commonwealth of Pennsylvania, appealed this case to the Pennsylvania Superior Court which

[1] 18 Pa. C.S.A. §3123(5) establishes 16 years as the age of consent. 18 Pa. C.S.A. §3122 establishes 14 years as the age of consent for the same act, since, by definition, "sexual intercourse" includes "sexual intercourse per os" 18 Pa. C.S.A. §3101. As originally enacted both statutory rape sections were consistent, as each established 16 years as the age of consent. However, the Pennsylvania Legislature subsequently amended 18 Pa. C.S.A. §3122 to reduce the age of consent to 14 years, thereby creating the inconsistency noted between Sections 3122 and 3123(5).

held that 18 Pa. C.S.A. §3123(5) was constitutional, vacated the judgment entered by the Court of Common Pleas of Monroe County, and remanded the case for trial.

The federal question sought to be reviewed herein was raised by omnibus pre-trial motion (Exhibit "E", App. p. 16a).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The instant Petition for a Writ of Certiorari should be granted because this case presents the important question of whether the due process requirement that a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalties is met by the Pennsylvania Crimes Code treatment of sexual intercourse per os, where the code contains inconsistent ages of consent to the same sexual act. This is an especially critical question because a conviction of this charge carries a mandatory five-year jail sentence, 42 Pa. C.S.A. §9718(a). It is clear that the Commonwealth of Pennsylvania, as part of its police power, may create and define criminal offenses through classifications of persons so long as these classifications are reasonable and the legislation bears equally on all in the same class, *Commonwealth vs. Lewis*, 443 Pa. 305, 279 A.2d 26 (1971), cert. denied, 404 U.S. 1003, 92 S.Ct. 571, 30 L.Ed.2d 556 (1971). An age classification in the Pennsylvania Crimes Code relating to sexual offenses is valid where it rests upon a real and substantial difference between the maturity of adults and that of youth. Therefore, Pennsylvania may enforce society's interest in fostering healthy surroundings to yield well-adjusted citizens, free of social and psychological scars by imposing a blanket prohibition on all deviate sexual experiences between young adolescents, *Commonwealth vs. Waters*, 334 Pa. Superior Ct. 513, 483 A.2d 855 (1984). The problem that is created in this case is that Pennsylvania has promulgated two inconsistent statutes covering the identical sexual conduct.

Thus, sexual intercourse per os with a participant 15 years of age is criminalized under 18 Pa. C.S.A. §3123(5) and decriminalized under 18 Pa. C.S.A. §3122. As originally promulgated, these sections were consistent in that both established an age of consent of 16 years. However, the Pennsylvania Legislature subsequently amended 18 Pa. C.S.A. §3122 to lower the age of consent to 14. The petitioner's conduct occurred subsequent to the effective date of the amended statute.

This case does not challenge the wisdom or propriety of establishing a particular age of consent for sexual acts with juveniles. However, it is respectfully submitted that all persons potentially subject to the Pennsylvania Crimes Code be adequately informed as to exactly what conduct constitutes a crime. In this regard, the Pennsylvania Superior Court, in the instant case, noted that an ambiguity existed in the statutory scheme.

It is axiomatic that a penal statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalties[.]" *Commonwealth vs. Heinbaugh,* 467 Pa. 1, 5, 354 A.2d 244, 246 (1976) (quoting *Connally v. General Construction Co.,* 269 U.S. 385 (1926)). No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. *Lanzetta vs. New Jersey,* 306 U.S. 451, 83 L.Ed. 888, 890, 59 Sup. Ct. 618 (1939).

The lower Court forcefully stated that "The inconsistency of age created by the amended statutory rape statute makes it unclear whether sexual intercourse per os or per anus with a 14- to 16-year old is a crime." (Exhibit "C", App. p. 11a)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to the Pennsylvania Supreme Court to review the order of that Court.

Respectfully submitted,
MILLER AND LOVE
BY MARK S. LOVE,
Attorney I.D. # 24844
Attorneys for Petitioner,
William Garner

Certificate of Service

I hereby certify that I am, this 8 day of November, 1988, serving by first class mail, postage prepaid, a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania of William Garner, Petitioner, upon the persons listed below:

E. David Christine, Esq.
District Attorney
Monroe County Courthouse
Stroudsburg, PA 18360

MILLER AND LOVE
MARK S. LOVE
Attorneys for Petitioner

Exhibit A

EXHIBIT "A"

SUPREME COURT OF PENNSYLVANIA
Eastern District

Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos
Deputy Prothonotary

468 City Hall
Philadelphia, PA 19107
(215) 560-6370

September 27, 1988

Mark S. Love, Esquire
MILLER and LOVE
315 Pocono Boulevard
Mount Pocono, Pa. 18344

RE: Commonwealth of Pennsylvania v. William Garner, Petitioner
No. 335 E.D. Allocatur Docket 1988

Dear Mr. Love:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"September 23, 1988.
Petition Denied.
Per Curiam".

Very truly yours,
s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Mark P. Pazuhanich, Esquire

Exhibit B

EXHIBIT "B"

J.49015/87

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

WILLIAM GARNER

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00301 Philadelphia, 1987

Appeal from Order Entered December 29, 1986, Court of Common Pleas, Criminal Division, Monroe County, No. 733-1986

FILED JAN 20 1988

BEFORE: CAVANAUGH, ROWLEY and MONTEMURO, JJ.

OPINION BY CAVANAUGH, J.:

This is an appeal from an order entered in the Court of Common Pleas of Monroe County on December 29, 1986, granting the appellee's Motion to Quash count one of appellant/Commonwealth's Criminal Information.

On August 14, 1986, the appellee was charged with one count of Involuntary Deviate Sexual Intercourse (IDSI), after allegedly having engaged in sexual intercourse *per os* with as 15 year old female.[1] The statutory definition of IDSI can be found in 18 Pa.C.S.A. §3123 and provides in pertinent part:

---

[1] The appellee was also charged with one count of indecent assault, and one count of corruption of morals. Neither count is the subject of this appeal.

Exhibit B

> A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person:
>
> (5) who is less than 16 years of age.

1972, Dec. 6, P.L. 1482 No. 334 §1, effective June 6, 1973. Section 3123(5) effectively removes consent as a defense to this particular charge. The separate and distinct offense of statutory rape is defined in 18 Pa.C.S.A. §3122 as follows:

> A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973.

Pursuant to 18 Pa. C.S.A. §3101, deviate sexual intercourse includes "sexual intercourse *per os* or *per anus* between human beings who are not husband and wife ..." That same provision defines sexual intercourse as "[in addition to its ordinary meaning] ... intercourse *per os* or *per anus*. ..."

In 1976, the Legislature amended §3122, reducing the age of consent in cases of statutory rape from 16 to 14. However, there was no explicit reduction in the age of consent under the IDSI statute. Relying on the foregoing, appellee filed a motion to quash the IDSI count on November 5, 1986. He argued that since deviate sexual intercourse fell within the broader definition of sexual intercourse, the IDSI and amended statutory rape provisions were irreconcilable insofar as they established different ages of consent for the identical activity, i.e., sexual intercourse with members of a specific age group. Appellee

claimed that a person who engaged in deviate sexual relations with a 14 or 15 year old (someone over the age of 13, but under the age of 16) could be held criminally liable under the IDSI provision, but not under the statutory rape provision. This, he maintained, was a violation of due process since it is well-established that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. ..." *Commonwealth v. Heinbaugh*, 467 Pa. 1, 5, 354 A.2d 244, 246 (1976) (*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926). Accordingly, appellee contended that the amendment to §3122 impliedly repealed §3123(5) and that the operative age of consent for both offenses was now 14.

Concluding that the statutes were ambiguous, the lower court granted appellee's motion to quash, citing the proposition that penal statutes should be strictly construed in favor of the defendant. *Commonwealth v. Darush*, 256 Pa. Super. 344, 348, 389 A.2d 1156, 1158 (1978). The Commonwealth filed a timely appeal from that order.

It is well-settled that the law does not favor repeal by implication. *See, e.g., Pa. Industries v. Com., State Sys. of Educ.*, 87 Pa. Commonwealth Ct. 1, 4, 485 A.2d 1233, 1234 (1985); *In Re Delinquent Tax Sale*, 83 Pa. Commonwealth Ct. 411, 416, 477 A.2d 603, 605 (1984); *Commonwealth v. Milano*, 300 Pa. Super. 251, 255, 446 A.2d 325, 327 (1982). As this court noted in *Patton v. Republic Steel Corp.*, 342 Pa. Super. 101, 114, 492 A.2d 411, 417 (1985), "Repeal by implication arises only where language used in the later statute is irreconcilably repugnant to the privisions of the earlier statute so as absolutely to preclude a

consonant construction of both." (*quoting Duda v. State Board of Pharmacy*, 38 Pa. Commonwealth Ct. 378, 381, 393 A.2d 57, 59 (1978). This principle is applicable in the case at bar. While it is true that the definitions of sexual intercourse and deviate sexual intercourse are not mutually exclusive, it is equally clear that the Legislature intended to make a distinction between the two forms of conduct. Although the wording of the definitional statute is somewhat ambiguous, common sense dictates that we recognize this distinction. It would be unreasonable to suppose that the Legislature considered the terms "deviate sexual intercourse" and "sexual intercourse" to be interchangeable. Section 3103 expressly differentiates between the two acts by including their definitions under alternative headings. It is beyond peradventure that the Legislature understood these acts to be separate and distinct. Any other interpretation would strain logic and lead to an absurd result. *See* 1 Pa. C.S.A. §1922.[2]

In order to properly construe the statutes in question, we must consider the legislative intent. *Appeal of Neshaminy Auto Villa Ltd.*, 25 Pa. Commonwealth Ct. 129, 133, 358 A.2d 433, 435 (1976) ("The polestar for construction of a statute or ordinance is the intention of the legislative body.") (citation omitted). Sections 3123(5) and 3122 are both aimed at protecting children who fall below a certain age. Given the inherent nature of "deviate," as opposed to "ordinary," sexual intercourse, it is logical to assume that

---

[2] Section 1922 provides in pertinent part:
In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumptions, among others, may be used:
(1) that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable.

the Legislature felt it necessary to develop specific safeguards for those who had not yet reached the age of 16. The fact that the additional two year period was removed from the amended statutory rape provision does not effect its continued validity under §3123, since the two penal statutes were designed to guard against distinct harms.

Moreover, the entire text of §3123 deals with *involuntary* deviate sexual intercourse, i.e., a non-consensual act. By its provisions it is clear that it seeks to protect those who are incapable of mature consent from engaging in deviate sexual acts. Thus, the protected victims are those who are subjected to force or threats or are not conscious, suffer from mental impairment, or are under the age of sixteen. On the other hand, while non-consensual intercourse does fall within the ambit of the statutory rape statute, that provision is primarily directed at consensual activity which nonetheless constitutes a criminal offense due to the age of the actors. Nowhere in §3122 did the Legislature include the words "involuntary," "threat" or "compulsion," whereas such language does appear in §3123. In light of the foregoing, it is obvious that the two statutes are not inconsistent and that "we must attempt to find a reasonable way to reconcile [them]." *Lewis v. Erie Ins. Exchange*, 281 Pa. Super. 193, 201, 421 A.2d 1214, 1218 (1980) (citations omitted). By holding that the 1976 amendment applies only to the crime of statutory rape, we readily achieve this goal.[3] *See Consumers Ed. & Protective*

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[3] In Commonwealth v. Charles, 339 Pa. Super. 284, 488 A.2d 1126 (1985), this court discussed the elements of IDSI and commented that "the fifth category of IDSI, deviate sexual intercourse with a person less than 16 years of age, is intended to prohibit any deviate sexual intercourse between an adult and a minor, regardless of consent." *Id.* at 290 n.3, 488 A.2d 1126, 1129 n.3. The *Charles* court discussed the discrepan-

Exhibit B

Ass'n v. Schwartz, 495 Pa. 10, 23, n. 17, 432 A.2d 173, 180, n. 17 (1981) ("[A] law is not repealed by a later enactment if the two may be operative without repugnance to each other.")

Order reversed. Jurisdiction relinquished and case remanded.

---

cies between gravity scores for a conviction of IDSI where the victim was under 14, and where the victim was 14 or over (but not yet 16) and there was evidence of consent. The court acknowledged the inconsistency of the scores in relation to §3123 since that statute removes consent as a defense when the victim is under the age of 16. *Id.* at 290, 488 A.2d at 1129. It further observed that §3123 and §3122 are inconsistent to the extent that the offense gravity score for statutory rape is uniformly set at 5, whereas the offense gravity score for IDSI with a minor 14 years of age or older and who consented to the act may be reduced from 9 to 5. *Id.* at 291, 488 A.2d at 1129. In the latter case, consent must be proven in order to justify a reduction in the gravity score. In the former case, consent is irrelevant. It is reasonable to infer from this that the *Charles* court considered IDSI to be a more serious offense than statutory rape. At the very least, the court recognized that the Legislature had provided different ages of consent for these two separate offenses. *Id.*

Exhibit B

J.49015/87

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

WILLIAM GARNER

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00301 Philadelphia, 1987

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of MONROE County be, and the same is hereby REVERSED AND REMANDED. JURISDICTION RELINQUISHED.

BY THE COURT:

s/ David (illegible)

PROTHONOTARY

Dated: JANUARY 20, 1988

J. 49015/87

COMMONWEALTH OF PENNSYLVANIA

Appellant

VS.

WILLIAM GARNER

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. No. 301 Philadelphia 1987

ORDER

The court hereby DENIES appellee's application for reargument of the decision dated January 20, 1988.

s/Per Curiam

PER CURIAM

Date: March 15, 1988

Exhibit C

EXHIBIT "C"

COURT OF COMMON PLEAS OF
MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM GARNER

NO. 733 CRIMINAL 1986

OPINION

Defendant, William Garner, has filed a Motion to Quash Count I of Commonwealth's Criminal Information filed against him. Count I charges Defendant with unlawfully engaging in sexual intercourse per os with Regina Weishuhn, age 15, in violation of 18 Pa.C.S.A. §3123(5). This statute makes it a crime to commit deviate sexual intercourse (hereinafter Involuntary Deviate Sexual Intercourse (IDSI)) with a person under 16 years of age, regardless of the victim's consent. Defendant attacks the constitutionality of this statute.

Defendant argues that the age of consent for IDSI should be 14 not 16 years. IDSI, in this instance, is similar to statutory rape in that the element of consent is removed for sexual acts committed with a minor. Sexual intercourse, in addition to its customary meaning including the anus or mouth, with a minor under the age of 14 who is not a spouse, constitutes statutory rape; the minor being statutorily unable to consent to such acts. 18 Pa.C.S.A. §3122 (1976). Both statutory rape and IDSI are essentially strict

liability crimes in that the willing participation of the minor cannot provide a defense; the issue of consent having been statutorily removed.

The Pennsylvania Crimes Code defines deviate sexual intercourse as "[s]exual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal". 18 Pa.C.S.A. §3101. The definition of sexual intercourse, "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, ..." 18 Pa.C.S.A. §3101. Thus, the same conduct constitutes both DSI and statutory rape.

The present IDSI statute was enacted by virtue of the Act of 1972, December 6, P.L. 1482, No. 334, Section 1, effective June 6, 1973, wherein the legislature also enacted the statutory rape section. Both statutes establish age 16 as the age of consent. *See* 18 Pa.C.S.A. §§3122, 3123 (1973). On May 18, 1976, effective in 30 days, the legislature amended the statutory rape section and lowered the age of consent to 14. *See* 18 Pa.C.S.A. §3122 (1976). However, no such amendment affected the IDSI statute. For unexplanable [sic] reasons, the legislature failed to consistently reduce the age of consent for all sexual offenses. Thus, the net effect is that consensual intercourse per os or per anus with an individual over age 14 is not a crime under the statutory rape provision, but is under the IDSI provision, provided that the victim is also under the age of 16 years. The same conduct may or may not be a crime, depending upon which statute is applied.

It is a well-established rule that a penal statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalties". *Commonwealth v. Heinbaugh*, 467 Pa. 1, 5, 354 A.2d 244, 246 (1976) (quoting *Connally v. General Con-*

struction Co., 269 U.S. 385 (1926)). It is unjust to convict a person of a crime without clear notice to him that his contemplated conduct was unlawful. *Heinbaugh*, at 5, 354 A.2d at 246. *Commonwealth v. Broughton*, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978). The inconsistency of age created by the amended statutory rape statute makes it unclear whether sexual intercourse per os or per anus with a 14- to 16-year-old is a crime. Since ambiguities in statutory construction are strictly construed, 1 Pa.C.S.A. §1928, in favor of the accused, *Commonwealth v. Driscoll*, 485 Pa. 99, 107, 401 A.2d 312, 317 (1979). *Commonwealth v. Godsey*, 342 Pa. Super. 24, 29, 492 A.2d 44, 47 (1985); *Commonwealth v. Ashford*, 263 Pa. Super. 100, 109, 397 A.2d 420, 422 (1979); *Broughton*, at 377, 390 A.2d at 1286; and common sense, *Commonwealth v. Bristow*, 185 Pa. Super. 448, 458, 138 A.2d 156, 159 (1958); *Commonwealth v. Carney*, 58 D. & C. 2d 345, 350 (1972), we determine that when the legislature amended the statutory rape section, they impliedly repealed section 3123(5) with respect to victims over the age of 14 years.[1] We recognize and affirm a strong public policy to deter sexual acts with minors. The need to know what constitutes a minor in the context of a sexual offense is crucial. Lowering the age of consent for IDSI to make it consistent with other sex offenses will not detract from this policy.

Furthermore, whenever the provisions of two statutes by different general assemblies are irreconcilable, the statute latest in date of final enactment shall prevail. 1 Pa.C.S.A. §1936. Thus, the age of consent for sexual offenses should uniformly be 14 years.

---

[1] The concept of implied repealer is specifically recognized by statute under 1 Pa.C.S.A. §1971.

Exhibit C

This type of an attack on the IDSI statute has not been addressed by the courts. In *Commonwealth v. Charles*, 339 Pa. Super. 284, 488 A.2d 1126 (1985), the Superior Court acknowledged the age discrepancy between the sentencing guidelines and the IDSI statute. The statute denies consent to minors under sixteen. The sentencing guidelines provide a lessor gradation for consensual deviate sexual intercourse committed with a victim who is 14 years of age. 204 Pa. Code §303.8.

The *Charles* court dismissed this difference by comparing the IDSI scores to the gravity scores of rape and statutory rape and finding them to be consistent. *Charles*, at 290-91; 488 A.2d at 1129. The *Charles* court acknowledged the inconsistencies in the statute, but only addressed it as far as the offense gravity scoring.[2]

From the statutory scheme of sex offenses and the sentencing guidelines, it is clear that the legislature intended the age of consent for sexual acts to be 14 years old. Such an omission in the IDSI statute was a mere legislative oversight.

Defendant is charged with engaging in sexual intercourse per os with a 15-year-old who was not his spouse in violation of 18 Pa.C.S.A. §3123(5). Since we determined that the age of consent for sexual offenses including IDSI is 14, the Commonwealth has plead [sic] no criminal conduct cognizable under Pennsylvania law in Count I.

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[2] The *Charles* court touched upon the facts that statutory rape and IDSI are both crimes based on the victim's age. It then went on to say that in both statutes, the "legislature has deemed the minor to be incapable of consenting and has deleted the element of lack of consent from the crime". *Charles*, at 290-91, n. 3, 488 A.2d at 1129, n. 3. No where in the Opinion did the court directly address the issue of what age is the age of consent.

Exhibit C

Therefore, we issue the following

ORDER

AND NOW, this 29th day of December, 1986, Defendant's Motion to Quash Count I of Commonwealth's Criminal Information is granted.

BY THE COURT:
s/ Ronald E. Vican
J.

cc: District Attorney
Mark S. Love, Esq.

Exhibit D

EXHIBIT "D"

COURT OF COMMON PLEAS OF
MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM GARNER

No. 733—1986

CHARGES: Corruption of Minors, Indecent Assault, Involuntary Deviate Sexual Intercourse

CRIMINAL INFORMATION

COUNT I

The District Attorney of Monroe County by this information charges that between September 14, 1985 and September 22, 1985, in said County of Monroe, at Paradise Township, Pennsylvania, William Garner did unlawfully engage in deviate sexual intercourse with another, Regina Weishuhn, who is less than 16 years of age, to wit: Defendant did unlawfully engage in sexual intercourse and did engage in sexual intercourse per os with Regina Weishuhn, age 15, in violation of Section 3123 (5) of the Pennsylvania Crimes Code, (18 P.S. 3123,5),

COUNT II

The District Attorney of Monroe County by this information charges that between September 14, 1985 and September 22, 1985, in said County of Monroe, at Paradise

Exhibit D

Township, Pennsylvania, William Garner did unlawfully have indecent contact with another person, not his spouse, or caused such other person to have indecent contact with him without the consent of the other person, to wit: Defendant did engage in sexual intercourse and did engage in sexual intercourse per os with Regina Weishuhn, in violation of Section 3126 (1) of the Pennsylvania Crimes Code, (18 P.S. 3126(1),

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COUNT III

The District Attorney of Monroe County by this information charges that between September 14, 1985 and September 22, 1985, in said County of Monroe at Paradise Township, Pennsylvania, William Garner, being the age of 18 years and upwards, did by any act corrupt or tend to corrupt the morals of any minor less than 18 years of age, or did aid, abet, entice or encourage any such minor in the commission of any crime, to wit: Did corrupt the said Regina Weishuhn, age 15, by engaging in sexual intercourse and did engage in sexual intercourse per os in violation of Section 6301 (a) of the Pennsylvania Crimes Code, (18 PS. 6301a).

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

18 P.S. 3123(5); 3126(1); 6301(a)
Citation of Statute and Section
Adopted and effective Feb. 15, 1974

(illegible)
Attorney for the Commonwealth

Exhibit E

EXHIBIT "E"

IN THE COURT OF COMMON PLEAS
OF THE 43RD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA
MONROE COUNTY—CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM GARNER

NO. 733—1986

DEFENDANT'S OMNIBUS PRETRIAL MOTION

Motion to Quash Count I of Information

1. The District Attorney of Monroe County has filed an Information against Defendant in the above captioned matter, Count I of which claims that Defendant unlawfully engaged in sexual intercourse per os with Regina Weishuhn, age 15, in violation of Section 3123(5) of the Pennsylvania Crimes Code.

Said charge is to the crime "involuntary deviate sexual intercourse".

2. Said charge is the equivalent of statutory rape in that the involuntary element, or lack of consent, in the charge, is due solely to the age of the victim, to wit 15 years.

3. A conviction on said charge subjects the Defendant to a mandatory sentence of five years without parole pursuant to 42 Pa. C.S.A. Section 9718(a).

Exhibit E

The present involuntary deviate sexual intercourse statute was enacted by virtue of Act of 1972, December 6, P.L. 1482, No. 334, Section 1, effective June 6, 1973.

At the time the involuntary deviate sexual intercourse statute was enacted, the legislature also enacted a statutory rape section appearing at 18 Pa. C.S.A. Section 3122. The original statutory rape section applied to sexual intercourse with another person who is less that 16 years of age. However, on May 18, 1976, P.L. 120, No. 53, Section 1, effective in 30 days, the legislature amended the statutory rape section to provide that the age of consent was 14 rather than 16. The amended section provides as follows:

"A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age."

4. The crimes code at Section 3101 specifically defines the term "sexual intercourse", to include, in addition to its ordinary meeting, intercourse per os.

The net effect of the amended statutory rape provision is that a person can engage in sexual intercourse with another individual over 14 years of age. This would include intercourse per os.

5. The net effect of the involuntary deviate sexual intercourse section is that a person cannot commit such conduct with a person under 16 years of age.

6. By virtue of the amendment to the statutory rape section, the legislature has impliably [sic] repealed Section 3123(5) with respect to victims who are over the age of 14. Any other result would be unconstitutional, illegal, arbitrary, capricious, a violation of substantive due process,

procedural due process and render the law void for vagueness.

7. Since the information filed in this matter indicates that the victim was 15 years of age, it is respectfully submitted that no criminal conduct cognizable under Pennsylvania law has been plead [sic] in Count 1.

WHEREFORE, Defendant respectfully prays your Honorable court to dismiss Count I of the Complaint.

Respectfully submitted,
MILLER AND LOVE

BY_____

MARK S. LOVE, ESQUIRE
Attorney I.D. # 24844
Attorney for Defendant